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IN THE

Supreme Court of the United States

DAVID SHOPE, HANK KLUMPP, CHARLES SHOOP, ROBERT BEST, RUTH BEST, ANDREW DRYSDALE, LOIS DRYSDALE, JERRY W. KERN, and SANDRA KERN,

Petitioners,

v.

STATE OF NEW JERSEY, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL, and NEW JERSEY WATER SUPPLY AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

REPLY BRIEF

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ARGUMENTS IN REPLY

I. Petitioners' Claim that the Highlands Act takes Property Without Just Compensation is Properly Raised by a Writ of Certiorari and is Ripe for Review.

The decision by the Appellate Division rejecting Plaintiffs' facial equal protection challenge to the New Jersey Highlands Act addressed whether the Plaintiffs were asserting a Takings Claim although same was not specified in the pleadings. The Court indicated:

> "Finally, Plaintiffs have the opportunity to seek waivers under the Highlands Act to the extent they consider the Act's impact to constitute a taking of their property. *OFP*, *Supra.*, 395 N.J.Super. at 584-587.
>
> To the extent Plaintiffs assert a diminution in the value of their land, which would appear more directly related to their interests in selling or developing their land rather than farming it, they raise the issue of an unconstitutional taking already decided in *OFP*, *Supra.*, 395 N.J.Super. at 580-585."

The appropriate remedy from this final decision by the New Jersey courts on this Federal Constitutional question is a Writ of Certiorari to review this portion of the Court's decision. Petitioners' takings claims are not based upon their individual takings claims but rather the aggregate takings from all owners of undeveloped properties. The known average impact on property is a

75% diminution with an aggregate Fifteen Billion Dollars diminution in value in the 410,000 acre preservation area portion of the Highlands Region. The uncontradicted expert reports establishing this diminution in value are sufficient to establish the impact of the Highlands Act to a "reasonable degree of certainty." *Palazzo v. Rhode Island*, 533 U.S. 606, 620(2001).

Petitioners' assertion is that the New Jersey Highlands Act's only public purpose is preservation of undeveloped property as an end in itself. While this may be appropriate for exercise of powers to acquire private property for fair market value pursuant to Eminent Domain, it is not a lawful exercise of the State's police powers and is a taking without just compensation.

In order to make an application for a Highlands Waiver/Takings, New Jersey's administrative procedures require a farmer to forego farming and instead propose a development plan for the property and obtain a Highlands preservation area approval (HPAA), *N.J.S.A.* 13:20-33. The extraordinary expenses associated with this process and the requirement that the development be proposed for the "minimal beneficial use of the land" results in an economic futility, where it will cost more to obtain an approval than the value to develop the property for the permitted level of development. It is only after this economic futility has been denied that New Jersey provides a waiver/takings procedure.

When enacted, the Highlands Act required a permanent program that included "a provision that may allow for a waiver of any provision of a Highlands

permitting review on a case by case basis if determined to be necessary by the Department in order to avoid the taking of private property without just compensation." *N.J.S.A.* 13:20-33(b)(3). The regulations implementing this legislative direction did not implement the waiver "provision" in the sense of a one shot application for an administrative exception. Instead, it establishes a multi-layered waiver process requiring aggrieved land owners to fulfill numerous, discrete administrative steps to apply for and obtain an exception of the Highlands Acts' restrictions. In order to get through the waiver process, a property owner must:

1. Receive a determination from DEP that the proposed development does not meet all the requirements (of the Highlands Act) as strictly applied; *N.J.A.C.* 7:38-6.8(b);

2. Prosecute and conclude all administrative and legal challenges to that determination, *i.e.* seek a Writ of Mandamus or declaratory type of relief in New Jersey Courts. *N.J.A.C.* 7:38-6.8(b);

3. Prove there is no alternative to the proposed development that constitutes a minimum economically viable use. *N.J.A.C.* 7:38-6.8(c) (1);

4. Identify investments in the property as a whole on which regulated activities are proposed and whether the investments and expectations were "reasonable". *N.J.A.C.* 7:38-6.8(c) (1), *N.J.A.C.* 7:38-6.8(d)(1-3); *N.J.A.C.* 7:38-6.8(d)(1) I-(VI).

5. Identify the environmental impacts of the minimum viable and economically feasible use for the property as a whole, and the consistency of these impacts with the goals of the Highlands Act. *N.J.A.C.* 7:38-6.8 (c)(f) (1-7);

6. Prove that the property owner has made a good faith effort to transfer the property's development rights, and has not received an offer to receive the development rights. *N.J.A.C.* 7:38-6.8(g)(2);

7. Prove that the property owner has offered the property for sale at or below fair market value (based on an appraisal of the minimum beneficial economic use of the property) to neighboring property owners, conservancy organizations, and governmental agencies. *N.J.A.C.* 7:38-6.8(g)(3);

8. Prove that the property owner has not received a reasonable offer based upon the minimum beneficial economically viable use of the property. *N.J.A.C.* 7:38-6.8(g)(4).

As demonstrated by the foregoing, the Highlands Act waiver process inappropriately requires affected land owners to pursue and accept remedial measures. First, the property owner must pursue all of his or her "administrative and legal challenges to this determination," *i.e.* seek a Writ of Mandamus or declaratory type of relief in the courts. *N.J.A.C.* 7:38-6.8(b). This sort of procedure was expressly repudiated in *Williamson County Regional Planning Commission*

v. Hamilton Bank of Johnson City, 473 U.S. 172, 193(1985) which rejected the argument that a property owner had to bring an action for declaratory relief before a takings claim was ripe. The property owner must make a good faith effort to transfer the property's development rights and a landowner cannot refuse an offer to receive the development rights. *N.J.A.C.* 7:38-6.8(g)(2). The Supreme Court has expressly rejected this TDR remedy as a valid ripeness requirement. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997).

Petitioners would be required to offer their property for sale to neighbors, land conservancies, environmental organizations, and government agencies at a value adjusted to the respective property's minimal economically viable use; *i.e.* at the depressed value after regulation by the Highlands Act. *N.J.A.C.* 7:38-6.8(g)(3),(4). This procedure undermines long established Constitutional protections recognizing the prohibition against the government from depressing land values for the purpose of acquiring property for public use for less than market value. Just compensation requires payment of market value of the property before enactment of value depressing regulations. *United States v. Reynolds*, 397 U.S. 14,15-17(1970). As noted in *United States v. Virginia Electric & Power Company*, 365 U.S. 624, 636 (1961):

> "It would be manifestly unjust to permit a public authority to depreciate property values . . . and then to take advantage of this depression in the price which it must pay for the property when eventually condemned." (Internal quotation and citation omitted)

The decision by the Appellate Division determining Petitioners' takings claims can only be reviewed by a Writ of Certiorari to the United States Supreme Court. Absent such review, Petitioners will be left with an administrative process for an HPAA which is an economic futility and forced to comply with waiver/takings provisions which violate established principles of Constitutional Law. In a very real sense, Petitioners and all other property owners within the preservation area will be effectively left without a remedy for this massive takings by the State of New Jersey.

II. The Facts Mandate that the Court Grant Plaintiffs' Petition to Declare Farming a Fundamental Constitutional Right.

The impact of the Highlands Act on farming is based on the 75% diminution in value of undeveloped property within the New Jersey Highlands preservation area. While the Highlands Act contains numerous provisions purportedly promoting the practice of farming, this loss in equity makes it impossible for a farmer to continue farming the land as a livelihood. While a farmer's equity reflects the development potential of the land, it is not synonymous with an interest in developing or selling the land. A farm's equity is needed as collateral to borrow against for equipment purchases, capital improvements, working capital, and to buffer lean years. Land value is the primary asset of a farm business. Accordingly, the facts mandate that the Court grant Plaintiffs' Petition to declare farming a fundamental constitutional right.

The absence of case law other than the distinguished *United States v. Plume*, 447 F.3d 1067 (8th Cir. 2006) demonstrates the need for review of this right rooted in Divine and Natural Rights.

The legal fiction 410,000 acre Preservation Area violates Petitioners' equal protection rights when subject to the strict judicial scrutiny required for a statute which interferes with a fundamental right.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request the Supreme Court grant review of this matter.

Respectfully submitted,

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